No. 94-434

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

It is a fundamental principle of desegregation law that the remedies ordered by the courts are temporary programs established to eliminate prior segregation and to eradicate the vestiges of that segregation to the extent practical. *Board of Education v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The imposition by the Eighth Circuit Court of Appeals of a requirement for permanent remedial funding as a prerequisite for a finding of unitary status is in direct conflict with this well-established rule.

The respondents pay lip service to that rule, but argue the court of appeals decision does not require such a permanent remedy. However, that argument contradicts the plain language of the court's decision. Resolution of this issue is crucial, not only in this case, where the court-ordered remedial quality education programs alone now cost approximately $54 million per year, but also in other desegregation cases across the United States that are headed into the final stages of their remedy phase.

I. The Decisions of the Courts Below Require the Creation of a Permanent Remedy.

A. The Decision of the Court of Appeals Requires Permanent Funding of Specific Programs as a Prerequisite for a Finding of Unitary Status, Thus Interfering with the Ability of the KCMSD to Adapt to Future Needs and the State to Allocate Resources to Address Critical Demands.

Contrary to the respondents' contention, the court of appeals explicitly endorsed the requirement that the defendants in this suit, the State of Missouri and the School District of Kansas City, Missouri (KCMSD), ensure the permanence of the remedial programs. The court expressed its fear that even if the State only gradually withdrew its extraordinary support for the KCMSD, there would be "a serious possibility of substantial elimination or disruption of the quality education programs." Pet. App. A-9. The court then stated that "[t]he KCMSD must administer and operate these programs." *Id.* (emphasis added). The court spoke of the State's obligation as well, which it defined as "the obligation to fund its share of the cost of these programs." *Id.* It is difficult to understand how the court could have

made its position more clear: unless and until there is a mechanism in place assuring the permanent implementation of "these [quality education] programs," there can be no partial or full unitary status finding.[1]

No one disputes that the KCMSD must return to a unitary system in order for this litigation to come to an end. However, mandating permanent funding for particular remedial programs, or mandating that a particular level of quality of education must be maintained, flatly exceeds any standard set by this Court or by the Equal Protection Clause of the Constitution. The court of appeals has thus confused the specific quality education programs in place with the concept of equal educational opportunity guaranteed by the Constitution, and so has elevated these temporary, remedial programs to the level of a constitutional right.

The respondents' own actions in the courts below belie their attempt to claim here that they really believe in the temporary nature of the remedy. In 1992, all of the respondents supported an effort to obtain a court order requiring the State to extend the entire magnet plan, along with its State funding, until sometime in the 21st century. *Joint Motion of KCMSD and Plaintiffs for Approval of Long-Range Magnet Renewal Plan*, (filed Sept. 1, 1992); *Transcript of January 25, 1993, Opening Statement of AFT counsel*, at 33-34. More recently, they indicated they would seek what on its face appears to be an extension of the remedy for a less-defined, but clearly lengthy multi-year

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[1] In the decision at issue, the Eighth Circuit affirmed the trial court's refusal to grant unitary status. But contrary to the assertions of the respondents, the issue here is not whether the State's factual evidence was sufficient; it is whether the lower courts could properly require permanent funding of the quality education programs.

period. *KCMSD First Report to the Court on Status of Magnet, Capital and Financial Planning*, (filed Sept. 14, 1994). Further, their determination has not faltered; within days of submitting their multi-year request, they submitted a plan to extend the magnet program (again, with State funding) until at least 2004. *See Long Range Magnet Renewal Plan* (submitted Sept. 28, 1994).

Even in response to the district court's order of April 16, 1993, calling for the submission of a long-range financing plan, KCMSD called for indefinite continuation of the current desegregation programs or their equivalents and the accompanying extraordinary funding. *See KCMSD Financial Plan Filed in Response to April 16, 1993 Order*, (filed July 30, 1993). There, the KCMSD stated:

> One of the major assumptions of the District's Financial Plan has been that the basic current annual operating and desegregation expenses of the District will continue into the coming decade at approximately their current levels. . . . Accordingly, KCMSD's Plan necessarily has been constructed, on the expenditure side, on the assumption of basic continuity in current expenditure levels.

Id. at 3-4 (footnote omitted and emphasis added). Clearly, the KCMSD has no plan for termination of any of the quality education components.

In mandating continual funding, the court of appeals has not limited itself even to the multi-year extensions the respondents have repeatedly sought. The court of appeal's position is clearly contrary to the mandate that authority for

managing the school district be returned to the local level -- even if in the eyes of the district's own management, the benefits of extraordinary state funding outweigh the disadvantages of having a court, rather than a community and the educational staff it selects, act as the final arbiter of educational decision-making.

B. The Decisions of the District Court, Although Superficially Suggesting that an End to Extraordinary Funding is Possible, Actually Endorse the Permanent Funding Requirement Adopted by the Court of Appeals.

While the court of appeals endorsed the permanent implementation of "the quality education programs" now in place, the district court has taken a slightly different tack. The respondents point to that approach, and attempt to draw from it some contradiction of the court of appeal's position. That effort is unavailing.

The district court order on which the respondents rely was accurately described by the court of appeals:

> [T]he district court has called for the parties to submit plans for financing "the magnet schools and the entire school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction can be maintained," assuming withdrawal of court-ordered fundings within three, five, seven and ten years, alternatively.

Pet. App. A-9. At first blush, this approach seems more flexible. It suggests a vision that "court-ordered funding" will eventually end. In reality, it is merely another method for articulating the same vision embodied in the court of appeals decision; *i.e.*, the district court may be willing to bring court-ordered desegregation funding to an end, but only when there is a permanent source of sufficient funds to permit the "entire" KCMSD to maintain its current spending levels. *Id.*

It is apparent that no other school district in the State of Missouri (with the exception of the St. Louis School District, which is also being funded under a desegregation decree) receives State funds at a level even remotely approaching those which the KCMSD now receives. The KCMSD, with just 4.28 percent of the state's student population in the 1993-94 school year, received 8.25 percent of state funds, excluding court-ordered desegregation funds -- nearly twice its "per capita" share. In the 1994-95 school year, with new funding formulas in place, the figure has grown to 8.46 percent. Thus, even without the court-ordered state aid, the KCMSD is receiving and will continue to receive state funding far in excess of what is provided to most other Missouri schools. The district court's decision, however, clearly states that such funding is not enough.[2]

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[2]In the district court's view, the KCMSD need never live within a budget even remotely similar to that of other Missouri school districts. Instead, the court wants to preserve a situation in which the KCMSD does not receive just 8.46 percent of the entire state budget allocated to local school support, but in which the KCMSD can continue to have available nearly 23 percent of the state elementary and secondary education budget. In the present school year this amounts to $77 million in basic state funding and $212 million appropriated for desegregation funding.

The court articulates that rule by speaking out of two sides of its mouth: on one side by asking for a plan to phase out court-ordered funding, but on the other side by demanding a plan that will permit the KCMSD to maintain programs and facilities that do not just match, but exceed those available in all other Missouri school districts. That can be done only by requiring the State to adjust its funding formulas to give the KCMSD more than five times its regular per-pupil share of the state education budget. From the point of view of the State, which merely funds and does not control or operate the KCMSD programs, that change is the practical equivalent of the court of appeal's mandate that there be permanent implementation of the KCMSD remedial programs themselves. The plan implicitly endorsed by the court of appeals would permanently continue the dilemma faced by the State today: that hundreds of millions of dollars are spent on extraordinary funding for a single school district, at a time when the number of minority and disadvantaged students in other districts is increasing, and when scientific data are showing that the causes of poor academic performance are not rooted in the educational system itself, but in the poverty, crime, joblessness, and other problems of our nation's urban areas. The district court's plan would permanently preclude the State of Missouri from making the policy determination that funds now spent on elaborate quality education and magnet school programs should instead be used to address those needs.

II. The Requirement that a Permanent Remedy be Implemented is Contrary to This Court's Entire Jurisprudence on School Desegregation Issues, as well as with the Decisions of Other Courts of Appeals.

The Eighth Circuit's requirement of permanent funding for programs is in direct contradiction to this Court's holdings in *Freeman* and *Dowell*:

> In *Dowell*, we emphasized that federal judicial supervision of local school systems was intended as a "temporary measure". 498 U.S. at 247, 111 S. Ct. at 636. Although this temporary measure has lasted decades, the ultimate objective has not changed - to return school districts to the control of local authorities.

Freeman, 112 S. Ct. at 1445. In *Dowell*, this Court rejected the "Draconian result" of "judicial tutelage for the indefinite future," *Dowell*, 498 U.S. at 249, and instead held:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

Id. at 248 (citations omitted).[3] Those decisions make it clear that such a restoration of control upon attainment of unitary status is mandatory:

> [R]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.

Freeman, 112 S. Ct. at 1445; *Dowell*, 498 U.S. at 247-49.

The court of appeals decision also conflicts with other federal appellate decisions on this issue. Respondents do not deny that every other circuit court that has considered the issue (other than the Tenth Circuit which this Court reversed in *Dowell*), has held that unitary status means a return of autonomy and responsibility for the subject school district to local authorities.

Respondents are left to argue the undisputed principle that unitary determinations are ultimately fact intensive. What respondents miss, however, is that the issue presented by the petition is a straight forward legal question: whether a federal court may order a perpetual remedy in a desegregation case by requiring continuation of remedial programs as a precondition to unitary status. It is on this issue that the Eighth Circuit has diverged from all courts of appeal that have ruled on this issue.

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[3]Of course, permanent funding of quality education programs would mean not only judicial tutelage for the indefinite future, but for all time.

CONCLUSION

The Eighth Circuit departed from settled precedents of this Court in requiring perpetual funding of quality education programs implemented as part of a desegregation remedy. Its opinion also is in conflict with numerous decisions among the circuits. This Court should therefore grant the State's petition for writ of certiorari.

Respectfully submitted,

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